87-402

No. _____

Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND ITS AFFILIATED DISTRICT LODGE NO. 143, AND ITS AFFILIATED LOCAL LODGE 2202

Petitioners,

v.

ALASKA AIRLINES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joseph P. Manners
1300 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 857-5200

Hugh Hafer *
David Campbell
Cheryl French
2505 Third Ave. - #309
Seattle, WA 98121
(206) 728-7280

Counsel for Petitioners

Counsel of Record *

FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

I. Question Presented

Whether the Ninth Circuit erred in holding that "judicial intervention for protection of individual employee [statutory] rights under" the Railway Labor Act is warranted only in "exceptional circumstances."

II. List of Parties

Petitioners are the International Association of Machinists and Aerospace Workers, AFL-CIO, its affiliated District Lodge No. 143 and its affiliated Local Lodge No. 2202.

Respondent is Alaska Airlines, Inc.

TABLE OF CONTENTS

Page

Question Presented i
List of Parties i
Table of Authorities v
Opinions Below 2
Jurisdiction 2
Statutory Provisions Involved 2
STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

THE NINTH CIRCUIT ERRED IN HOLDING THAT "JUDICIAL INTERVENTION FOR PROTECTION OF INDIVIDUAL EMPLOYEE [STATUTORY] RIGHTS UNDER" THE RAILWAY LABOR ACT IS WARRANTED ONLY IN "EXCEPTIONAL CIRCUMSTANCES."

A. *As Recently Reiterated in Buell, This Court Has Long Held That The Courts, Not Labor Arbitrators, Have Jurisdiction Over Employees' Statutory Claims. The Ninth Circuit's Denial Of Jurisdiction Over A Railway Labor Act Claim Conflicts With This Principle.*

B. *The Ninth Circuit's Holding That The Courts Do Not Have General Jurisdiction To Hear Statutory RLA Claims Conflicts With The Decisions Of The Other Appellate Courts Which Have Considered The Issue.*

C. *The Court's Resolution Of The Proper Forum Before Which RLA Statutory Claims Are To Be Heard Is Necessary To Insure That The Statutory Claims of Tens Of Thousands Of Employees Are Determined On The Merits.*

CONCLUSION 14

APPENDICES

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES
Table of Cases

Page

Adams v. Federal Express Corp., 547 F.2d 319 (6th Cir. 1976), *cert denied*, 431 U.S. 915 (1977) 8

Air Line Pilots Assn. v. United Air Lines, 802 F.2d 886 (7th Cir. 1986) 10, 11

Alaska Airlines, 813 F.2d 1038 (9th Cir. 1987) 2, 5, 6

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ... 5

Arcamuzi v. Continental Airlines, 819 F.2d 935 (9th Cir. 1987) 12, 13

Atchison Topeka and Santa Fe Railroad v. Buell, 480 U.S. ____, 94 L.Ed.2d 563 (1987) 4-6, 14

Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981) 5

BRAC v. Philadelphia, Bethlehem & New England R.R., 428 F. Supp. 1308 (E.D. Pa. 1977) 9

Brady v. Trans World Airline, Inc., 401 F.2d 87 (3d Cir. 1968), *cert denied*, 393 U.S. 1048 (1969) 9

Brotherhood of Locomotive Engineers v. Staten Island Rapid Transit Operating Authority, 100 LRRM 3154, Nos. 78-C-2083 and 78-C-1931 (E.D.N.Y. March 5, 1979) 9

Brotherhood of Railroad Trainmen v. Central Georgia Railway Co., 305 F.2d 605 (5th Cir. 1962) 8, 9

Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970) 8

Chicago and North Western Railway Co. v. United Transportation Union, 402 U.S. 570 (1971) 7

TABLE OF AUTHORITIES
(continued)

Table of Cases

Page

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 710 (1945) 7

Empresa Ecuatoriana de Aviacion v. Int'l Assn. of Machinists and Aerospace Workers, District Lodge No. 100, 690 F.2d 838 (11th Cir. 1982), *cert denied*, 463 U.S. 1250 (1983) 11

Independent Union of Flight Attendants v. Pan American World Airways, 789 F.2d 139 (2d Cir. 1986) 12

Independent Federation of Flight Attendants v. Trans World Airlines, Inc., 643 F. Supp. 470 (W.D. Mo. 1986) 11

Independent Federation of Flight Attendants v. TWA, Inc., 819 F.2d 839 (8th Cir. 1987) 11

Intl's Assn. of Machinists v. Northwest Airlines, Inc., 673 F.2d 700 (3rd Cir. 1982) 12

Int'l Brotherhood of Teamsters v. Pan Am World Airways, 607 F. Supp. 609 (E.D. N.Y. 1985) 9

McDonald v. West Branch, 466 U.S. 284 (1984) 5

NLRB v. Erie Resister Co., 373 U.S. 221 (1963) 10

NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938) 11

Northwest Airlines, Inc. v. ALPA, 442 F.2d 251 (8th Cir. 1971), *cert denied*, 404 U.S. 871 (1971) 9

TABLE OF AUTHORITIES
(continued)

Table of Cases

Page

Railway Labor Executives Assoc. v. Boston & Maine R.R., 808 F.2d 150 (1st Cir. 1986), *cert pending*, 56 U.S.L.W. 3002 (1987) 8-11

Roscello v. Southwest Airlines, 726 F.2d 217 (5th Cir. 1984) 8

Ruby v. TACA International Airlines, 439 F.2d 1359 (5th Cir. 1971) 8, 9

Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 547 (1929) 7, 14

Statutes

28 U.S.C. § 1254(1) 2

45 U.S.C. § 152 ..... 7, 9, 14

45 U.S.C. § 153(i) 7

45 U.S.C. § 181, § 182 and § 184 7

Other Authorities

U.S. Dept of Commerce, Bureau of the Census, *Statistical Abstract of the United States*, (107th Ed. 1987) pp. 22, 23, 802 14

No. _____

IN THE

Supreme Court of the United States

October Term, 1987

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND ITS AFFILIATED DISTRICT LODGE NO. 143, AND ITS AFFILIATED LOCAL LODGE 2202

Petitioners,

v.

ALASKA AIRLINES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, the International Association of Machinists and Aerospace Workers, AFL-CIO, et. al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, which became the decision terminating review in the above entitled proceeding on May 28, 1987.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 813 F.2d 1038 and is reprinted in Appendix A.

The order and judgment of the United States District Court for the Western District of Washington dismissing the Union's complaint, and its later order denying the Union's motion to vacate, have not been reported. They are reprinted in Appendix B.

Jurisdiction

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of the Union's complaint by the district court in an opinion filed April 1, 1987. The Union's timely petition for rehearing and suggestion for rehearing en banc was denied on May 28, 1987. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Railway Labor Act

45 U.S.C. § 152 (Third) and (Fourth)

Amendments to Railway Labor Act for Carriers by Air

45 U.S.C. § 181, § 182 and § 184

Reproduced in full in Appendix C

Statement of the Case

The Petitioners, The International Association of Machinists and Aerospace Workers and its affiliates, District Lodge 143 and Local Lodge 2202 ("Unions"), are labor organizations representing two separate units of employees working for Alaska Airlines, Inc. ("Alaska"). The Respondent, Alaska, is an air carrier. One collective bargaining unit includes mechanics and related personnel ("Mechanics unit"). The other unit includes office, clerical

and passenger service personnel ("COPS unit"). The two units have separate collective bargaining agreements with Alaska, which expire at different times.

On March 4, 1985, after following proper statutory procedures, the Mechanics unit went on strike. During this strike, approximately 95 of the employees in the COPS unit refused to cross the Mechanics' picket lines.

When the Mechanics' strike ended, the COPS unit employees who had honored the picket lines offered to return to work. Alaska refused to allow them to return to their jobs. Instead, Alaska established a recall plan under which priority for new jobs was given to employees who were hired as replacements during the strike and employees who had crossed picket lines.

On August 26, 1985, the Unions filed this suit in response to Alaska's treatment of the strikers. The Unions alleged that Alaska had 1) permanently replaced the strikers, even though there was no business necessity to do so, 2) accorded replacements superseniority and 3) by this and other similar conduct violated Section 2 of the Railway Labor Act ("RLA"). The Unions also alleged Alaska violated the RLA by refusing to provide it with information relevant to related grievances.

On August 29, 1985, the Unions filed a motion seeking a preliminary injunction to halt Alaska's practice of granting superseniority to replacements. On February 5, 1986 the district court denied the Unions' motion for a preliminary injunction and *sua sponte* dismissed the Unions' complaint for lack of subject matter jurisdiction. The Union's motion to vacate the judgment was denied on June 6, 1986.

On April 1, 1987 the Ninth Circuit affirmed the district court's dismissal. The court reasoned that all disputes arising between carriers and unions under the RLA are "major disputes", involving the formation or

modification of a contract, or "minor disputes", involving the interpretation of collective bargaining agreements. "Minor disputes" are within the exclusive jurisdiction of the Adjustment Boards, arbitration panels established under the RLA by the carrier and the union. The court rejected the Union's argument that this suit falls within a third category of disputes involving statutory violations, over which the courts have jurisdiction. The court concluded that "judicial intervention" in disputes involving statutory violations is warranted only in "exceptional circumstances", and held this suit involved a "minor dispute" over which the Adjustment Board had exclusive jurisdiction.

On March 26, 1986 shortly before the Ninth Circuit filed its opinion, the Adjustment Board ruled that it did not have jurisdiction to hear the Unions' statutory claims. The Unions filed a petition for rehearing and suggestion of rehearing en banc with the Ninth Circuit, alerting the Ninth Circuit to this Court's recent decision in *Atchison Topeka and Santa Fe Railroad v. Buell*, 480 U.S. ____, 94 L.Ed.2d 563 (1987) and the decision of the Adjustment Board denying jurisdiction. The petition for rehearing was denied on May 28, 1987.

Reason for Granting the Writ

THE NINTH CIRCUIT ERRED IN HOLDING THAT "JUDICIAL INTERVENTION FOR PROTECTION OF INDIVIDUAL EMPLOYEE [STATUTORY] RIGHTS UNDER" THE RAILWAY LABOR ACT IS WARRANTED ONLY IN "EXCEPTIONAL CIRCUMSTANCES."

A. *As Recently Reiterated In Buell, This Court Has Long Held That The Courts, Not Labor Arbitrators, Have Jurisdiction Over Employees' Statutory Claims. The Ninth Circuit's Denial Of Jurisdiction Over A Railway Labor Act Claim Conflicts With This Principle.*

On four separate occasions, this Court has held that employees' right to a hearing in federal court on statutory claims will not be denied because of the availability of arbitration under a collective bargaining agreement for related contractual claims.[1] The Ninth Circuit held to the contrary, ruling that it did not have jurisdiction to hear the employees' claims that Alaska's conduct violated the RLA. The Ninth Circuit found that the courts have jurisdiction to hear statutory claims brought under the RLA only in "exceptional circumstances." *Alaska Airlines*, 813 F.2d at 1040; Appendix A, 5-6.

Buell, 94 L.Ed.2d at 569, is of particular relevance here, since it involved an employee covered by the RLA.[2]

---

[1] *Buell*, 94 L.Ed.2d at 572-74 (Federal Employees' Liability Act claim); *McDonald v. West Branch*, 466 U.S. 284, 286-288 (1984) (Section 1983 claim); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745-46 (1981) (Fair Labor Standards Act wage claim); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-56 (1974) (Title VII claim).

[2] *Buell* was decided on March 24, 1987, a few days before the Ninth Circuit's decision was filed on April 1, 1987. It was brought to the court's attention in the Unions' petition for rehearing and suggestion of rehearing en banc.

In *Buell*, the Court noted that under the RLA, arbitration before the Adjustment Board was "mandatory" for a claim "based squarely in an alleged breach of the collective bargaining agreement." *Buell*, 94 L.Ed.2d at 573. Nonetheless, it held the federal courts have jurisdiction to decide a "statutory" claim brought under the Federal Employers Liability Act, despite the fact the statutory claim "was caused by conduct that may have been subject to arbitration under the RLA." *Buell*, 94 L.Ed.2d at 572. The Court reasoned that despite "the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers'." *Buell*, 94 L.Ed.2d at 572-73 (citation omitted).

Here, the Ninth Circuit acknowledged that the Unions contended Alaska's conduct "involves violations of Section 2 of the RLA." *Alaska Airlines*, 813 F.2d at 1040; Appendix A-5. *Buell* and its predecessors were briefed and argued to the Ninth Circuit. Nonetheless, the lower court did not follow these cases. Without citing or attempting to distinguish *Buell* and its predecessors, the Ninth Circuit concluded that the courts have jurisdiction over allegations of statutory violations under the RLA only in "exceptional circumstances". *Alaska Airlines*, 813 F.2d at 1040; Appendix A-7. The statutory violations alleged by the Unions were held not "sufficient to invoke the federal courts' jurisdiction." *Alaska Airlines*, 813 F.2d at 1040-41; Appendix A-7. The Ninth Circuit's departure from this Court's long established rule that the federal courts, not

labor arbitrators, have jurisdiction over statutory claims warrants review by this Court.[3]

B. *The Ninth Circuit's Holding That The Courts Do Not Have General Jurisdiction To Hear Statutory RLA Claims Conflicts With the Decisions Of The Other Appellate Courts Which Have Considered The Issue.*

The Railway Labor Act guarantees employees "the right to organize and bargain collectively through representatives of their own choosing." 45 U.S.C. § 152 Fourth. This Court has recognized that rights and duties included in Section 152 are "legal obligations", enforceable in the courts. *Chicago & North Western Railway Co. v. United Transportation Union*, 402 U.S. 570, 578-81 (1971) (Duty to bargain in good faith, mandated in Section 152 First, is "intended to be overseen by appropriate judicial means"); *Texas & New Orleans Railroad Co. v. BRSC*, 281 U.S. 547, 567-69 (1929) (Courts have jurisdiction to enforce by injunctive relief employees' right under Section 152 Third to freely choose their representative without carrier "coercion" or "interference"). In contrast, the RLA provides that disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," termed "minor disputes", are subject to binding arbitration by the Adjustment Board chosen by the parties. 45 U.S.C. § 184; 45 U.S.C. § 153(i); *See also, Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 710, 722-25 (1945).

[3] Consistent with *Buell* and its predecessors, the Adjustment Board reached the conclusion that the "statutory issue is to remain within the legal forum and not within this contractual arbitral hearing." Unions' Pet. for Rehearing, Attachment A, pp. 16-19. Unfortunately, in combination with the Ninth Circuit's ruling that the courts do not have jurisdiction over statutory RLA claims, this leaves the employees with rights under the RLA, but no forum to provide a remedy. This result is contrary to the Court's holding in *Texas & New Orleans Railroad Co.*, 281 U.S. at 568-69, that enforcement of a "definite statutory prohibition of conduct" in the RLA "was contemplated" by Congress.

Given this framework, it is not surprising that the appellate courts have generally found that they have jurisdiction to determine claims alleging a party's conduct violated the RLA. The First and Fifth Circuits have both held the courts have jurisdiction to hear such statutory claims in cases where the claims arise during the term of a labor contract and arbitration was available.[4] The Ninth Circuit's decision here, holding that jurisdiction over such claims exists only in "exceptional circumstances", directly conflicts with these decisions.

Of particular note, because it involved a carrier's treatment of strikers, is the First Circuit's decision in *Railway Labor Executives Assoc. v. Boston & Maine R.R.*, 808 F.2d at 156-58. The First Circuit recognized that a claim based solely on the collective bargaining agreement would "unquestionably" be within the exclusive jurisdiction of the Adjustment Board. However, the claim alleged was that "the carrier has discriminated against its employees because they have engaged in activities [participating in a strike] protected by the RLA." Regardless of the carrier's defense that it had a "contractual right" to

---

[4] *Railway Labor Executives Assoc. v. Boston & Maine R.R.*, 808 F.2d 150, 156-58 (1st Cir. 1986), *cert pending*, 56 U.S.L.W. 3002 (1987); *Brotherhood of Railroad Trainmen v. Central Georgia Railway Co.*, 305 F.2d 605, 608 (5th Cir. 1962); *Ruby v. TACA International Airlines*, 439 F.2d 1359, 1364 (5th Cir. 1971).

Other suits over which the courts have found jurisdiction involve allegations that a carrier violated RLA protections during a union organizing campaign, before a contract had been signed. *E.g., Roscello v. Southwest Airlines*, 726 F.2d 217 (5th Cir. 1984) (discharge for organizing activities); *Adams v. Federal Express Corp.*, 547 F.2d 319 (6th Cir. 1976), *cert denied*, 431 U.S. 915 (1977) (harassment and discharges during organizing campaign); *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970) (discharge for organizing activities). The Ninth Circuit distinguished such cases from this case on the grounds that "judicial involvement was the only means of enforcing the RLA", since there was no Adjustment Board to take jurisdiction under these circumstances. This rationale conflicts with *Buell* and its predecessors.

eliminate jobs, the First Circuit concluded the courts have jurisdiction over the Union's claim that such conduct was a "*statutory* violation of the RLA." *Boston & Maine R.R.*, 808 F.2d at 156-57 (emphasis in original).

A similar conclusion was reached by the Fifth Circuit in *Railroad Trainmen*, 305 F.2d at 608, where an employee's discharge was at issue. The Court ruled that it is "exclusively" within the jurisdiction of the Adjustment Board to determine whether the 'just cause" provision of the collective bargaining agreement was violated when the employee was discharged. *Railroad Trainmen*, 305 F.2d at 607. Nonetheless the courts have jurisdiction to examine the merits of an employee's discharge, where the Union alleged the carrier's purpose was "to thwart [the employee's] effectiveness as a collective bargaining agent", a statutory violation. *Railroad Trainmen*, 305 F.2d at 608; *See also, Ruby*, 439 F.2d at 1364 (Union alleged the carrier had moved its pilot base to rid itself of the union; Carrier's "patent violation" of Section 152 Fourth "is subject to restraint by federal court injunction, regardless of whether such a suit generates a major dispute")[5]

---

[5] Other cases in which the courts have indicated they have jurisdiction over violations of the RLA are *Northwest Airlines, Inc. v. ALPA*, 442 F.2d 251 (8th Cir. 1971), *cert denied*, 404 U.S. 871 (1971) (Although Adjustment Board has jurisdiction to determine if Union has waived right to honor picket lines, courts determine if RLA prohibits sympathy strikes.); *Brady v. Trans World Airline, Inc.*, 401 F.2d 87 (3d Cir. 1968), *cert denied*, 393 U.S. 1048 (1969) (Court have jurisdiction to hear claim discharge under union security provision violates the RLA); *Brotherhood of Locomotive Engineers v. Staten Island Rapid Transit Operating Authority*, 100 LRRM 3154, 3157, Nos. 78-C-2083 and 78-C-1931 (E.D.N.Y. March 5, 1979) (Court has jurisdiction to decide if carrier unlawfully penalized employees for striking; defers to ICC for determination of whether employer is a "carrier"); *BRAC v. Philadelphia, Bethlehem & New England R.R.*, 428 F. Supp. 1308 (E.D. Pa. 1977) (Court has jurisdiction to decide if carrier violated RLA by aiding employee in filing union decertification petition.) *But see, Int'l Brotherhood of Teamsters v. Pan Am World Airways*, 607 F. Supp. 609 (E.D. N.Y. 1985) (Court does not have jurisdiction to hear claim carrier discriminated against returning strikers; involves contract interpretation).

In contrast, the Ninth Circuit in this case refused to find jurisdiction over the Unions' statutory claims because "this case does not present the exceptional circumstances requiring judicial intervention." Like the claim in *Boston & Maine R.R.*, the gravamen of the Unions' suit is that Alaska's discriminatory treatment of the employees who refused to cross the Mechanics' picket lines violated the RLA. Specifically, the Unions alleged that Alaska violated the RLA by hiring permanent replacements for the strikers, even though there was no business necessity to do so, by granting superseniority to replacements and by other similar conduct. The Union's legal and factual claims have never been determined on the merits as the complaint was *sua sponte* dismissed by the district court. The Ninth Circuit upheld this dismissal despite other appellate courts having adjudicated the precise type of RLA statutory claims at issue here.

The basis for the Union's superseniority claim is that Alaska's recall program gave employees who crossed the picket lines an advantage in bidding for future job openings. This will harm those who honored the picket lines for years to come. This type of future advantage was ruled unlawful by this Court under the Taft-Hartley Act in *NLRB v. Erie Resister Co.*, 373 U.S. 221, 228 (1963) (Unlawful for employer to give employees who crossed picket lines unearned seniority to protect them from layoff.) The Seventh Circuit has held that under some circumstances, a carrier violates the RLA by rebidding all jobs during a strike. This rebid resulted in those who crossed the picket lines increasing their seniority relative to those who honored the picket lines. *Air Line Pilots Assn. v. United Air Lines*, 802 F.2d 886, 898 (7th Cir. 1986). Similarly, the Eighth Circuit has held that a carrier "impermissibly discriminates among union members on the basis of the degree of their union activity" by allowing

employees (not new hires) who crossed picket lines to retain their jobs while strikers with more seniority waited for recall. *Independent Federation of Flight Attendants v. TWA, Inc.*, 819 F.2d 839, 843-44 (8th Cir. 1987), petition for rehearing en banc pending.

The Union's claim that those who honored the picket lines could not be permanently replaced[6] is supported by the Seventh Circuit's decision in *United Air Lines*, 802 F.2d at 898 and *Empresa Ecuatoriana de Aviacion v. Int'l Assn. of Machinists and Aerospace Workers, District Lodge No. 100*, 690 F.2d 838, 846 (11th Cir. 1982), *cert dismissed*, 463 U.S. 1250 (1983). In *United Air Lines*, the Seventh Circuit held that the RLA limits a carrier's right to hire premanent replacements for strikers to circumstances in which permanent replacement is "reasonably necessary to keep the operation of the carrier ongoing."[7] *United Air Lines*, 802 F.2d at 898. In *Empresa Ecuatoriana*, the Eleventh Circuit approved the district court's action of "scrutinizing each replacement." 690 F.2d at 846. The First Circuit similarly found that the discriminatory treatment of strikers is a statutory violation of the RLA.[8] Regardless of this Court's ultimate ruling on the merits of these types of claims, the claims the Unions have raised in this suit are claims of statutory violations of the RLA, not contractual claims.

---

[6] The issue of whether an employer covered by the Taft-Hartley Act could hire permanent replacements under any circumstances required determination by this Court. *NLRB v. McKay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

[7] *But see, Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 643 F. Supp. 470, 473-74 (W.D. Mo. 1986) (Strikers treated the same under RLA as under the Taft-Hartley Act).

[8] *RLEA v. Boston & Maine R.R.*, 808 F.2d at 158 (Violation of RLA for carrier to abolish jobs in retaliation for participation in strike).

Thus, the Ninth Circuit's ruling limiting its jurisdiction over statutory violations of the RLA to "exceptional circumstances" directly conflicts with decisions by the First and Fifth Circuits.[11] It also conflicts with the assertion of jurisdiction by the Seventh, Eighth and Eleventh Circuits over statutory RLA claims similar to those raised here.

Paradoxically, the arbitrariness of the Ninth Circuit's "exceptional circumstances" test is best demonstrated by its recent decision in *Arcamuzi v. Continental Air Lines*, 819 F.2d 935, 938-39 (9th Cir. 1987). There, the court had no difficulty hearing the claim by two strikers' that the carrier violated the RLA by requiring them to take polygraph examinations before they could return to work. Yet here, the Unions' claim that the carrier violated the RLA by preventing almost one hundred employees from returning to work because they honored the Machinists' picket lines is not "a statutory violation sufficient to invoke the federal courts' jurisdiction." By any criteria, the Unions' claims

---

[11] The Second and the Third Circuits have also addressed the issue of court jurisdiction over statutory claims under the RLA, but the basis for their decisions is unclear. In *Int'l Assn. of Machinists v. Northwest Airlines, Inc.*, 673 F.2d 700, 710 (3rd Cir. 1982), the Third Circuit indicated that if disciplinary action is taken in "an effort [by the carrier] to destroy or undermine [the union], then the district court properly could assume jurisdiction." This was the Union's claim, but the court concluded it lacked jurisdiction because "the record does not demonstrate that [the carrier] had violated Section 2" of the RLA. 673 F.2d at 703. In *Independent Union of Flight Attendants v. Pan American World Airways*, 789 F.2d 139, 143 (2d Cir. 1986), the Second Circuit similarly found no jurisdiction over the Union's statutory RLA claim because "[the union] failed to demonstrate that [the carrier's] conduct reflected the requisite improper objective".

here involve a more significant statutory violation.[12] The court should grant review to resolve the conflict among the Circuits and to correct the Ninth Circuit's erroneous standard for determining jurisdiction over RLA statutory claims.

C. *The Court's Resolution Of The Proper Forum Before Which RLA Statutory Claims Are To Be Heard Is Necessary To Insure That The Statutory Claims Of Tens Of Thousands Of Employees Are Determined On The Merits.*

The airline industry is an industry crucial to this nation's economy. Deregulation of the airline industry has resulted in significant destabilization and reorganization. Concomitant with deregulation, the industry is experiencing an increasing number of labor disputes. This increase is reflected in the increase in the volume of litigation brought under the RLA.[13]

Here, the employees found they had no remedy for the violation of their right to engage in collective activity. The Ninth Circuit denied the courts had jurisdiction to hear their claims of statutory violations under the RLA. The Adjustment Board denied it had jurisdiction to hear their statutory claims. The employees' claims under the RLA have never been heard on the merits. That employees,

---

[12] The issue of jurisdiction apparently was not raised by the parties in *Arcamuzi*. However, subject matter jurisdiction is an issue a court may raise *sua sponte*. Fed. Rules Civ. Proc. 12(h); Rules App. Proc. 1(b). Judge Schroeder, who wrote the decision in *Arcamuzi*, was on the panel that decided this case.

[13] RLA cases are reported in Section 103 of the BNA Labor Relations Reporter. Digests of cases reported since 1980 fill 158 pages, while the digests of all RLA cases reported in the prior fifty-five years fill only 231 pages. Digests of RLA cases filed in 1986 fill 32 pages, almost half the 62 pages required to report cases reported between 1981 and 1985.

almost fifty years after this Court's decision in *Texas & New Orleans Railroad*, 281 U.S. at 568, would be left without a remedy for the violation of the "definite statutory prohibition of conduct" found in Section 152 Fourth of the RLA is inconceivable. Moreover, given the difficulty in applying consistently the Ninth Circuit's jurisdictional standard requiring "exceptional circumstances" before it will hear a statutory claim under the RLA, this situation is likely to reoccur.[14]

The Ninth Circuit's decision denying jurisdiction over statutory claims under the RLA ignores *Buell*, directly conflicts with rulings by the First and Fifth Circuits, and cannot be reconciled with decisions of the Seventh, Eighth and Eleventh Circuits adjudicating statutory claims under the RLA. In these uncertain times, the issue of the proper forum for resolution of statutory RLA claims will continue to reoccur until resolved by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

---

[14] Even if only the Ninth Circuit adopts this standard, the 17.2 percent of this nation's population living and working in its jurisdiction will be affected by the ramifications of this decision in the vital transportation industry. U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States*, (107th Ed. 1987) pp. 22, 23, 802.

DATED this 26th day of August, 1987.

Respectfully Submitted,
Joseph P. Manners
Washington, D.C.

* Hugh Hafer
David Campbell
Cheryl French
Seattle, Washington

Counsel for Petitioners

* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE No. 2202, *Plaintiffs-Appellants,* v. ALASKA AIRLINES, INC., *Defendant-Appellee.*	Nos. 86-3926; 86-3623 D.C. No. C85-1671M OPINION

Argued and Submitted
March 2, 1987 — Seattle, Washington

Filed April 1, 1987

Before: Alfred T. Goodwin, Mary M. Schroeder and Jerome Farris, Circuit Judges.

Opinion by Judge Goodwin

Appeal from the United States District Court
for the Western District of Washington
Walter T. McGovern, Chief Judge, Presiding

SUMMARY

Jurisdiction/Railroads/Aviation

Appeal from dismissal of action. Affirmed.

This action arises from appellee Alaska Airlines' replacement of members of appellant International Association of Machinists and Aerospace Workers (IAMA) when they participated in a sympathy strike. IAMA alleges that Alaska Airlines' action violated the Railway Labor Act (RLA). Alaska Airlines counterclaims that the employees violated the no-strike clause of their collective bargaining agreement and were properly discharged and replaced. The district court held that it lacked subject matter jurisdiction because IAMA's claims involved a minor dispute subject to the exclusive jurisdiction of the System Board of Adjustment.

[1] Minor disputes under the RLA, concern the interpretation or application of collective bargaining agreements, and are resolved through binding arbitration before the System Board of Adjustment. Federal courts do not have jurisdiction to resolve minor disputes. [2] This case does not involve a direct attempt to destroy a union. The System Board of Adjustment is fully equipped to decide the merits of the contract dispute. [3] Therefore, this case does not present the exceptional circumstances requiring judicial intervention. [4] IAMA cannot show a statutory violation sufficient to invoke the federal courts' jurisdiction, and does not contend that its claim involves a major dispute under the RLA.

COUNSEL

David Campbell, Seattle, Washington, for the appellants.

Valerie L. Hughes, Bellevue, Washington, for the appellee.

OPINION

GOODWIN, Circuit Judge:

International Association of Machinists and Aerospace Workers and local affiliates (IAMA), appeal the dismissal of their action for want of jurisdiction. IAMA sued to enjoin Alaska Airlines, Inc., (Alaska), from implementing a bid and rehire plan adopted after a strike. In support of a motion for a preliminary injunction, IAMA argues that Alaska's plan was a *per se* violation of the Railway Labor Act ("RLA") 45 U.S.C. § 151, *et. seq*. Holding that the dispute was preempted by the exclusive jurisdiction of the Systems Board of Adjustment, the district court denied the motion for a preliminary injunction and *sua sponte* dismissed the case.

IAMA represents two separate divisions of Alaska Airlines employees. One division represents clerical, office and professional employees and the other division represents mechanics and employees in related occupations. The two divisions have had separate collective bargaining agreements with Alaska for a number of years. The bargaining agreements of the two divisions expire at different times.

In December 1983, the mechanics' agreement was opened for negotiations through procedures required by 45 U.S.C. § 156 of the RLA. After extended negotiations mediated by the National Mediation Board, the mechanics and Alaska were unable to agree on a new contract. On March 4, 1985, the mechanics called a strike. The strike was ultimately resolved by a back-to-work agreement which applied only to the mechanics' division.

Throughout the strike, the collective bargaining agreement of the clerical, office and professional workers with Alaska contained a "no-strike" clause prohibiting those employees from striking for the duration of their contract. During the course of the mechanics' strike, however, approximately 95 clerical, office and professional workers honored the mechanics' picket lines. Alaska hired replacement workers to

fill the positions vacated by sympathy strikers. At the conclusion of the mechanics' strike, Alaska refused to rehire the clerical, office and professional sympathy strikers and rejected their offers to return to work.

Instead, Alaska established a recall plan under which priority for new jobs was given to employees who were hired as replacements and to clerical, office and professional employees who crossed the picket lines. A number of sympathy strikers have been denied recall, or if recalled, have been placed in jobs of lower status than they held before the strike.

IAMA alleges that various features of Alaska's recall plan violate the RLA. Specifically, the complaint alleges that Alaska's (1) hiring of permanent replacements, (2) grant of superseniority status to replacements, and (3) refusal to provide relevant information relating to outstanding contractual grievances, all violate the RLA. Alaska's counterclaim asserts that the sympathy strikers violated the "no-strike" clause of the agreement and accordingly were properly discharged and replaced.

The district court denied IAMA's motion for a preliminary injunction and dismissed the complaint on the ground that it lacked subject matter jurisdiction to hear the dispute. The existence of subject matter jurisdiction is an issue of law appropriate for de novo review. *Lord Jim's v. N.L.R.B.*, 772 F.2d 1446, 1448 (9th Cir. 1985).

The district court held it lacked subject matter jurisdiction because IAMA's claims involved a "minor dispute" subject to the exclusive jurisdiction of the System Board of Adjustment.

[1] The RLA is made applicable to the airline industry by 45 U.S.C. § 181-187. *See International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 685-89 (1983). Case law tends to classify disputes that arise between carriers and employee unions under the RLA as either "major" or "minor." *International Ass'n of Machinists v. Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985) (citing *Elgin, Joliet & Eastern Ry. v.*

Burley, 325 U.S. 711, 722-28 (1945)). Major disputes concern statutory rights, such as the right to form collective bargaining agreements or to seek to secure new rights and incorporate them into future agreements. *Aloha Airlines*, 776 F.2d at 815. Federal courts have jurisdiction to decide major disputes. *International Ass'n of Machinists v. Northwest Airlines*, 673 F.2d 700, 706 (3d Cir. 1982). Minor disputes, on the other hand, "concern the interpretation or application of collective bargaining agreements, and are resolved through binding arbitration before the System Board of Adjustment. *Aloha Airlines*, 776 F.2d at 815. Federal courts do not have jurisdiction to resolve minor disputes. *Id.*

Because this case does not involve a dispute over the formation of a collective bargaining agreement or efforts to secure new rights, IAMA understandably contends that the dispute is neither major nor minor, but involves violations of Section 2 of the RLA.[1] 45 U.S.C. § 152. The union argues that a statutory claim is not within the scope of the mandatory scheme for resolutions through arbitration. It cites several cases holding that in certain limited circumstances federal courts have jurisdiction over disputes arising from RLA violations whether the disputes are characterized as major or minor. *See Burke v. Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970). *See also, Northwest Airlines*, 673 F.2d 700 (3d Cir. 1982); *Conrad v. Delta Airlines*, 494 F.2d 914 (7th Cir. 1974); *Ruby v. Taca Int'l Airlines*, 439 F.2d 1359 (5th Cir. 1971); *Brotherhood of R.R. Trainmen v. Central of Georgia Ry. Co.*, 305 F.2d 605 (5th Cir. 1962); *Local 808, Int'l Brotherhood of Teamsters v. P & W R.R. Co.*, 576 F.Supp. 693 (D. Conn. 1983).

However, the authority IAMA cites is inapplicable to the facts before us. In each cited case, judicial involvement was the only means of enforcing the RLA. For example, in

---

[1] Section 2 establishes the rights of parties to choose their own bargaining representatives and prohibits company interference with Union affairs.

Conrad and *Burke*, plaintiffs were individual employees who alleged they were discharged for attempting to organize a union. As their discharges took place before their unions were certified, they could not get union representation or an administrative hearing.

[2] In *Ruby*, the defendant airline had attempted to nullify the collective bargaining agreement by moving its operations to El Salvador. The case thus involved a fundamental attack on the collective bargaining process, rather than a breach of the agreement's terms. Further, only the federal courts had the power to enjoin the airline from carrying out its plan. This case, by contrast, does not involve a direct attempt to destroy a union. The System Board of Adjustment is fully equipped to decide the merits of the contract dispute.

[3] IAMA's reliance on *Central of Georgia* is also misplaced. In that case, the court exercised jurisdiction over a union's claims that the carrier's discipline of a union representative was an attempt to interfere with its employees in their choice of representation. *Central of Georgia* has been limited to its facts. *Northwest Airlines*, 673 F.2d 707 n.6; *Local 808, Int'l Brotherhood of Teamsters*, 576 F. Supp. at 703. As the Third Circuit pointed out, in *Central of Georgia*, the court "considered nothing but the 'bare bones' pleadings and therefore had to accept the allegations in the complaint as true." *Northwest Airlines*, 673 F.2d at 709. Those allegations were that the company's investigation of a union official was intended to coerce the employees in their choice of a representative. *Id.* In this case, of course, the plaintiff is a union rather than an individual employee, and IAMA has not shown that the System Board of Adjustment is unable to resolve its dispute. The legality of Alaska's recall plan will almost certainly depend on whether the employees violated the collective bargaining agreement by honoring picket lines. The System Board of Adjustment, not the federal courts, has jurisdiction to interpret the collective bargaining agreement. *Aloha Airlines*, 776 F.2d at 815. Therefore, while one

possible interpretation of the contract may weaken the union's tactical position, this case does not present the exceptional circumstances requiring judicial intervention.

IAMA does not contend that Alaska was attempting to interfere with the workers' choice of a bargaining representative; the union alleges only that the recall plan weakens their union by replacing members, and so violated the RLA. This roundabout effort to reach a statutory violation is not a sufficient ground for a court to assume jurisdiction.

[4] Because IAMA cannot show a statutory violation sufficient to invoke the federal courts' jurisdiction, and does not contend that its claim involves a "major" dispute under the RLA, the district court properly dismissed the case for lack of subject matter jurisdiction.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE NO. 2202,	)	No. 86-3926 No. 86-3623 D.C. No. C85-1671M
Plaintiffs-Appellants.	)	
vs.	)	
ALASKA AIRLINES, INC.	)	ORDER
Defendant-Appellee.	)	

Before: GOODWIN, SCHROEDER and FARRIS, Circuit Judges.

The panel has voted to deny the appellants' petition for rehearing and reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing and no active judge called for a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE NO. 2202,	)	
Plaintiffs,	)	
v.	)	No. C85-1671M
ALASKA AIRLINES, INC.,	)	ORDER
Defendant.	)	

This action is before the court on the motion of Plaintiff International Assocation of Machinists and Aerospace Workers ("IAM") for a preliminary injunction barring Defendant Alaska Airlines from further implementation of a "super-seniority" plan instituted as a result of a work stoppage by the union. The basic facts are not disputed.

THE FACTS

Defendant Alaska Airlines, Inc. ("Alaska") is an air carrier headquartered in Bellevue, Washington. Plaintiffs IAM and its affiliates District Lodge 143 and Local Lodge 2202 ("Unions") are labor organizations representing two separate groups of Alaska employees. One unit is composed of mechanic and related positions ("Mechanics"). The other is composed of office, clerical, and professional positions ("COPS").

For many years, the mechanics and COPS units have been covered by separate collective bargaining agreements. The COPS' agreement has been in full force and effect for all periods pertinent to this action. The Mechanics' agreement, however, was opened for renegotiation procedures required under the Railway Labor Act, 45 U.S.C. § 151, *et seq*. The mechanics called a strike beginning on March 4, 1985. The strike was settled pursuant to a June 4, 1985 back-to-work agreement applicable *solely* to the mechanics unit.

During the course of the mechanics' strike, approximately 95 members of the COPS group honored the mechanics' picket lines. Alaska hired permanent replacements to fill their positions. At the conclusion of the strike, Alaska declined to negotiate a back-to-work agreement for the COPS sympathy strikers, and refused their offers to return to work. Instead, Alaska established a recall plan it contends is based on seniority. When a job opening occurs, Alaska awards the job on a promotional basis to replacements and COPS unit employees who crossed picket lines, rather than calling sympathy strikers back to work.

The Union filed a grievance alleging the recall plan violated the current COPS contract. Alaska declined to expedite the grievance procedure and, the union alleges, refused to provide information pertinent to the grievance. This suit alleges Alaska's hiring of premanent replacements, refusal to provide information and institution of the so-called

"super seniority" plan violate the Railway Labor Act. Although all the above conduct is at issue in the lawsuit, the pending motion only seeks a preliminary injunction barring the super seniority plan.

Plaintiff Union basically asserts one argument in support of its motion for preliminary injunction: that Alaska's purported "super-seniority" plan is a *per se* violation of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* and is causing irreparable harm to the union's members. Alaska, for its part, asserts several defenses: that Plaintiff is barred by the Norris-LaGuardia Act, 29 U.S.C. § *101, et. seq.* from seeking injunctive relief, that the Unions have demonstrated little chance of success on the merits of the case, that the RLA does not confer the right to strike in sympathy of another union, that the contract between the parties expressly prohibits strikes, that Plaintiff's exclusive contractual and administrative remedies bar this lawsuit and Plaintiff's injuries, if any, can be satisfied through an award of damages.

Because of the Court's disposition in this matter, it is not necessary to discuss most of Plaintiff's claims and Alaska's defenses.

I. The Major-Minor Dispute Provisions.

Under the RLA, all disputes arising between carriers and employee unions are either major or minor. *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 722-28 (1945), *aff'd on rehearing*, 327 U.S. 661 (1946). Minor disputes involve the meaning, interpretation or proper application of existing collective bargaining agreements and are resolved through binding arbitration before a System Board of Adjustment. *International Association of Machinists and Aerospace Workers v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985); *International Association of Machinists & Aerospace Workers v. Republic Airlines*, 761 F.2d 1836, 1839 (9th Cir. 1985). On the other hand, a major dispute concerns the formation of

collective bargaining agreements or efforts to secure new rights and incorporate them into future agreements. *Eglin*, 325 U.S. 15 723 [sic]; *Aloha Airlines, supra.* In *Aloha Airlines*, the Court noted that a major dispute is initiated by the filing of a notice proposing changes in the collective bargaining agreement. A major dispute is within the jurisdiction of this court.

In a minor dispute, however, if the parties are unable to resolve their differences through negotiations or prescribed grievance procedures, the arbitrator has exclusive jurisdiction to interpret the collective bargaining agreement and make an appropriate award. *IAM v. Republic Airlines*, 761 F.2d 1386 (9th Cir. 1985). The arbitrator also must consider equitable defenses to arbitration and determine whether the party demanding arbitration has satisfied procedural requirements. *Republic Airlines*, 761 F.2d at 1390. Minor grievances ultimately are decided by adjustment boards.

In the instant action, Alaska argues that the RLA imposes an affirmative duty on a carrier and its employees to resolve the dispute in arbitration. If that fails, jurisdiction falls to the System Board of Adjustment, pursuant to the provisions of 45 U.S.C. § 184. Alaska contends this dispute grows out of grievances or from the interpretation or application of agreements and that the COPS sympathy strikers only have such rights as are conferred by the agreement. The union argues that this dispute is major because Alaska is discriminating against employees participating in a protected activity. Alternatively, the union contends Alaska is estopped from relying on the contractual dispute resolution procedure because it has refused to waive the preliminary stages of the grievance procedure and has declined to provide the union various documents. Applying the tests set forth by Ninth Circuit in *Aloha Airlines* and *Republic Airlines, supra*, it is clear this action *does not* involve the *formation* of a collective bargaining agreement. The collective bargaining agreement between Alaska and COPS was in full force and effect at the

time of the walkout and neither party claims any negotiations were underway to change the agreement. Accordingly, this action cannot be a major dispute as contemplated by the RLA. This dispute does involve the meaning, interpretation and/or proper application of the existing collective bargaining agreement between Alaska and the Union, and therefore is "minor" and within the exclusive jurisdiction of the System Board of Adjustment. Therefore, this Court lacks jurisdiction to address Plaintiff's complaints.

While Plaintiff does not offer any legal authority for its contention that Alaska has waived the contractural [sic] procedure by its alleged obstruction of arbitration, the argument has some merit. It is distressing that Alaska may obstruct the arbitration process because this Court lacks jurisdiction over this "minor dispute." However, to borrow from *International Brotherhood of Teamsters v. Pan American World Airlines,* 607 F. Supp. 609 (E.D. N.Y. 1985), a benighted conception of labor relations does not rise to the level of discrimination of coercion that would justify judicial intervention. Therefore, the Court must dismiss Plaintiff's motion for a preliminary injunction because the dispute herein is "minor" as defined by the jurisprudence under the Railway Labor Act, 45 U.S.C. § 151, *et. seq.*

II. The No Strike Clause.

The collective bargaining agreement between the Union and Alaska contains a no-strike clause:

> It is the intent of the parties of this Agreement that the procedures herein shall serve as a means of peaceful settlement for all disputes that may arise between them. During the life of this Agreement the Company will not lock out any employee; the Union will not cause or permit its members to cause, nor will any member of the Union take part in any sit-down, stay-in, or slowdown in any plant, hangar or facility

> of the Company, or in any curtailment or restriction of operation, overhaul, repair or servicing of airplane, or any work of the Company. *The Union will not cause or permit its members to cause, nor will any member of the Union take part in any strike or stoppage* of any of the Company's operations, or picket any of the Company plants or premises until the bargaining procedures outlined in this Agreement and provided for in the Railway Labor Act have been exhausted; and in no case where a grievance or dispute comes under the jurisdiction of the System Board of Adjustment as provided for herein. The Company reserves the right to discipline any employee taking part in any violation of this provision of the Agreement, or engaging in any willful destruction or defacing of Company property. (Emphasis added.)

Agreement, Article III, § D.

Alaska argues this clause prohibits *any strike* during the term of the contract without first exhausting the administrative procedures set forth for resolving disputes. In support of its position, Alaska cites *Indianapolis Power & Light Co. v. Local 1395, International Brotherhood of Electrical Workers, AFL-CIO*, 273 N.L.R.B. No. 211 (1985), where the Board noted that the relationship between work stoppages and the honoring of picket lines is so well understood in the industrial climate that using the word "strike" includes work stoppages resulting from the refusal to cross picket lines. *News Union of Baltimore v. NLRB*, 393 F.2d 673, 676-77 (D.C. Cir. 1968). In *Indianapolis Power*, the NLRB held, in accord with earlier decisions in several circuits[1] that:

---

[1] *NLRB v. Rochaway News Supply Co.*, 345 U.S. 71 (1953); *United States Steel Corp. v. NLRB*, 711 F.2d 772 (7th Cir. 1983); *W-I Canteen Service v. NLRB*, 606 F.2d 738, 748 (7th Cir. 1979); *News Union of Baltimore v. NLRB*, 393 F.2d 673 (D.C. Cir. 1968).

> If a collective-bargaining agreement prohibits strikes, we shall read the prohibition plainly and literally as prohibiting all strikes, including sympathy strikes. If, however, the contract or extrinsic evidence demonstrates that the parties intend to exempt sympathy strikes, we shall give the parties' intent controlling weight. We therefore overrule such cases as *United States Steel* and *W-I Canteen Service* to the extent that the standard applied there is inconsistent with this holding.

273 N.L.R.B. No. 211 at 3.

In this case, the collective bargaining agreement says the union will not cause or permit, nor will any member of the union take part in "*any strike or work stoppage* of any of the company's operations. . . ." Agreement, Article III, §D. (Emphasis added.) There is nothing in that language creating an exception for sympathy strikes. Furthermore, it is hard to imagine clearer language: the agreement prohibits "any strike."

Waiver of the right to conduct a sympathy strike must be clear and unmistakable. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The Union's main contention is that the no strike clause "is obviously addressed to primary strikes. It nowhere expressly addresses sympathy strikes. Hence, there is no 'clear and unmistakable' waiver." Plaintiff's Memorandum in Support of Preliminary Injunction at 17. In support of its position, Plaintiff cites *NLRB v. Southern California Edison Co.*, 646 F.2d 1352 (9th Cir. 1981), where the Court found that a no strike clause, read in conjunction with an arbitration clause, *did not* constitute a "clear and unmistakable" waiver of the right to engage in a sympathy strike. However, *Southern California Edison* is distinguishable. In *Southern California Edison*, the NLRB determined there was no clear and unmistakable waiver because of insufficient

evidence dealing with the intent of the parties. The Board determined, and the Ninth Circuit agreed, that the no-strike provision of the contract was implicitly tied to the arbitration clause in the contract, and therefore was limited to arbitrable disputes. While the clause here also is tied to the arbitration clause and therefore, is very similar to that in *Southern California Edison,* that decision was based upon precedents the NLRB has discarded. The NLRB has abandoned and overruled its decisions in *United States Steel* and *W-I Canteen Service,* the authority upon which the *SCE* decision is grounded, and now reads a prohibition against strikes as "plainly and literally" prohibiting all strikes, including sympathy strikes.

The Union argues that the no-strike clause was not meant to cover sympathy strikes but only disputes arising under the agreement between the parties, not those between Alaska and a different bargaining unit over a different contract. But the wording of the contract prohibits *any strike* without first resorting to the arbitration procedures in the contract or the dispute resolution procedures of the RLA. Therefore, the sympathy walkout by the union violated the provisions of the contract.

CONCLUSION

Considering the foregoing, the Court finds that:

1. The dispute between Plaintiff and Defendant is "minor" as defined by the jurisprudence under the Railway Labor Act, 45 U.S.C. § 151, *et. seq.* and therefore, this Court lacks jurisdiction to entertain this action; and

2. The actions of Plaintiff union in striking in sympathy with the mechanics unit of the International Association of Machinists violated the no-strike clause of the collective bargaining agreement between Plaintiff and Defendant and therefore, the union is not entitled to the protections of the Railway Labor Act, 45 U.S.C. § 151, *et. seq.*

Accordingly, the motion for preliminary injunction is DENIED and the complaint of Plaintiff IAM is DISMISSED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 5th day of February, 1986.

/s/

WALTER T. McGOVERN
Chief United States District Judge

B-11

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL,	)	
	)	CASE NO.
Plaintiffs,	)	C85-1671M
v.	)	
	)	JUDGMENT
ALASKA AIRLINES, INC.,	)	
Defendant.	)	

This matter having come on for consideration before the Court, Honorable Walter T. McGovern, Chief United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED, that the motion for a preliminary injunction is denied and the complaint is dismissed.

DATED this 5th day of February, 1986.

/s/

Deputy United States District Clerk

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and its affiliated DISTRICT LODGE NO. 143, and its affiliated LOCAL LODGE NO. 2202,	)	No. C85-1671M
Plaintiffs,	)	ORDER ON MOTION TO VACATE
v.	)	
ALASKA AIRLINES, INC.,	)	
Defendant.	)	

Dissatisfied with the Court's order denying its motion for preliminary injunction and dismissing its complaint, Plaintiff moves the Court to vacate its order entered on February 5, 1986 and to dismiss Alaska's counterclaim.

Plaintiff argues that this Court erred in holding that all disputes under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, are either "major" or "minor." Plaintiff asserts there is substantial federal case law holding that courts may remedy statutory violations during the term of an agreement.

However, the cases cited by Plaintiff in support of its contention that there is a third type of claim that is neither major or minor are not applicable in this case. Defendant

correctly points out that the cases cited by Plaintiff fall into three general categories: cases where injunctions were issued in connection with a major dispute, cases involving conduct *prior* to certification of a union as the collective bargaining representative of employees, and cases where an *individual employee* claimed wrongful discharge for engaging in protected concerted activity.

This case does not involve an injunction issued in connection with a major dispute. As the Court already has held, this action involves a minor dispute which is outside its jurisdiction. The precertification cases also are irrelevant and Plaintiff's attempts to rely upon Section 152, Third and Fourth of the RLA is misplaced. Those sections protect employees from discharge for participating in union organizing before designation of a representative or certification by the National Mediation Board.

Plaintiff contends these cases reveal a *statutory claim* that may be litigated under the RLA. It argues that because Plaintiff's claims purportedly arise under Section 2, Third through Fifth of the RLA, because the complaint alleges discrimination for union activity, because the claims arose during an existing agreement, and because the underlying dispute presents both contractual and statutory issues, the complaint states a statutory claim that is neither major or minor.

Alaska suggests two reasons why this Court should decline Plaintiff's invitation to fashion a third type of dispute under the RLA. First, Alaska once again argues that the union's "sympathy strike" was not a protected concerted activity under the RLA, and second, the union violated the collective bargaining agreement between the parties. The airline points out that the cases relied upon by the union all involved disciplinary proceedings against employees involved in *protected* concerted activities. While the Court has serious doubts about whether sympathy strikes are a protected concerted activity under the RLA, it need not decide that issue.

However, the Court is convinced that the agreement between the parties prohibited *any strike* by the COPS unit. It is illogical to suggest that a walkout in violation of the no-strike clause is a "protected activity" under the RLA. Suffice it to say this Court should remain unconvinced that there is a third type of claim under the RLA covering statutory violations.

However, assuming *arguendo* there was a third type of claim, Plaintiff's own violation of RLA would deprive the union of the ability to assert that claim against the carrier. The union cannot self-righteously seek to cloak itself with the protections of the RLA against alleged wrongdoing by the carrier while at the same time it engaging [sic] in a walkout in violation of its own collective bargaining agreement and in arguable contravention of the statute. Additionally, to find the existence of a "third claim" under the act would require total disregard of the clear, unequivocal language of the Ninth Circuit in *International Association of Machinists v. Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985), where the court said, "*All* disputes that arise between carriers and employee unions under the Railway Labor Act are *either* major or minor." 776 F.2d at 812 (emphasis added).

The court has carefully examined the Ninth Circuit cases cited by Plaintiff purportedly supporting its contention that there is a third type of claim under the RLA for a statutory violation. In *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970), the court held that an individual who was *not* a union member could bring suit under the RLA in his own name. In *Switchmen's Union v. Southern Pacific*, 253 F.2d 81, 82 (9th Cir. 1958), *cert. denied*, 353 U.S. 818 (1959), the court determined judicial review of a dues check-off dispute was proper under the RLA. While *Burke* is distinguishable based upon the fact that the party seeking the protection of the RLA was not covered by a collective bargaining agreement, *Switchmen's Union* warrants closer examination. The district court opinion, *Southern Pacific Co. v. Switchmen's Union*, 138 F. Supp. 919 (N.D. Cal. 1956), indicated

jurisdiction was based upon both the RLA and, apparently, diversity of citizenship. Neither the district court nor the court of appeals addressed the issue of whether the dispute was "major" or "minor". The dispute in *Switchmen's Union* involved the validity of a dues checkoff agreement by the railroad with certain members of the Trainmen's union working as yardmen despite an agreement with the Switchmen's Union about yardmen's dues. The dispute appears to have involved the interpretation of a collective bargaining agreement. As such, it appears to have been "minor" under the RLA and outside the jurisdiction of the court. While this court is reluctant to second-guess the reasoning of two 30-year-old opinions, they cannot be read as establishing a statutory third cause of action under the RLA. This court instead is persuaded by the reasoning of the Ninth Circuit in *Aloha Airlines* that all claims under the RLA *either* are major or minor, and accordingly rejects Plaintiff's suggestion that it must reconsider the previous order.

II. The *Sua Sponte* Dismissal

Plaintiff secondly argues it was improper for this court to *sua sponte* dismiss Plaintiff's complaint. As support for this argument, Plaintiff calls to the attention of the Court *Dodd v. Spokane County*, 393 F.2d 330, 333-334 (9th Cir. 1968). According to the Union, the Ninth Circuit in *Dodd* reversed a dismissal of a complaint without notice to Plaintiff. But what the Union did not point out is *Dodd* involved two *pro se* civil rights actions by a former jail inmate. His complaints were on two separate occasions dismissed on the same day they were filed without issuance of or service of process, without notice and without an opportunity to submit a written argument. *Dodd* is not even slightly similar to this case. The rights denied plaintiff in *Dodd* were afforded the Union in this matter. The Union's contention that dismissal of its complaint violated the notice requirements of the Federal Rules of Civil Procedure demonstrates a fundamental

misunderstanding of the doctrine of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3) governs this concept:

> (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

The rule makes clear that any time it appears the court lacks jurisdiction over the subject matter, it *shall* dismiss the case. *See, Kamsler v. Zaslawsky*, 355 F.2d 526 (7th Cir. 1966); *Timberlane Lumber v. Bank of America*, 574 F.2d 1453 (N.D. Cal. 1983).

It cannot be disputed that this action did not involve formation of a collective bargaining agreement, but instead involved the meaning, interpretation and/or proper application of an existing agreement. As such, it was a minor dispute within the meaning of the RLA and the Ninth Circuit jurisprudence interpreting the statute. This court does not have subject matter jurisdiction over minor disputes and accordingly had no discretion other than to dismiss Plaintiff's complaint.

III. The No-Strike Clause Issue

Defendant's third argument suggests the court erred in its "assumption" that the no-strike clause issue is dispositive.

Initially, the Court notes that Plaintiff's contention that dismissal was premised only on the violation of the no strike clause is incorrect. Denial of the preliminary injunction was based on two *separate* and *distinct* legal theories: (1) that the dispute between the Plaintiff Union and the carrier was "minor" and therefore outside this Court's jurisdiction, and (2) that the Union's violation of the no strike clause in its contract deprived Plaintiff of the protections afforded by the RLA. The complaint was dismissed for lack of subject matter jurisdiction.

Plaintiff Union points to two cases that hold that employees who engage in unlawful strikes under the RLA retain their statutory rights in support of its contention that this action should not have been dismissed. *National Airlines v. Machinists*, 416 F.2d 998, 1003 (5th Cir. 1969); *E.E.D.A. v. Machinists District Lodge 100*, 690 F.2d 838, 854 (11th Cir. 1982). Both cases are distinguishable in that they involved *discharge* of strikers. Plaintiff acknowledges that the COPS employees have not been discharged by Alaska and still maintain some rights. Those rights will be determined at the proper time before the System Board of Adjustment, which has exclusive jurisdiction of this minor dispute.

The RLA looks to settlement of minor disputes through arbitration and embraces a strong policy of continuation of the employer-employee relationship. The Union here had a contractual duty not to strike. The carrier was obligated to provide public transportation, and had the right to employ replacements to continue operations. Alaska did not carry out a mass, punitive discharge of COPS employees. It operated with non-striking COPS employees, supervisors, and replacements hired to fill immediate needs. Since the end of the strike, Alaska has reinstated at least some of the strikers to positions with the company. As positions open, those jobs first are offered to the COPS employees not yet working. Simply stated, these COPS employees have retained employment rights under the RLA.

The Plaintiff's major complaint is that the strikers were not immediately reinstated to their former positions at full seniority. The Act, and the cases cited by Plaintiff, do not require reinstatement. Although the strikers retained some rights, they deprived themselves of the full protections of the RLA by walking out in violation of their collective bargaining agreement. Whether or not the Union members are entitled to regain seniority rights is a question for the System Board of Adjustment. This court lacks jurisdiction to consider that question, because it involves a minor dispute.

The Court could not have dismissed Plaintiff's complaint based only upon the violation of the RLA by the union. If that was the *only* issue before the Court, it simply would have denied the motion for an injunction and allowed the litigation to proceed. However, that is not the case here. While Defendant indeed may have been entitled to continue to litigate this action were the sole issue its violation of the RLA, once it was determined that the major dispute between the parties was "minor" under the Act, the court was deprived of jurisdiction and had no choice but to dismiss Plaintiff's complaint.

Accordingly, the Court's previous order of February 5, 1986, is modified to clarify that Plaintiff's motion for a preliminary injunction is DENIED based upon lack of subject matter jurisdiction and violation of the Railway Labor Act, 45 U.S.C. Section 151, *et seq.* by the union in staging a walkout in contravention of the no strike clause in the collective bargaining agreement. The Plaintiff's complaint is DISMISSED pursuant to Fed. R. Civ. P. 12(h)(3) for lack of subject matter jurisdiction. Plaintiff's motion for reconsideration is DENIED.

IV. The Motion to Dismiss Defendant's Counterclaim.

Plaintiff Union moves to dismiss Defendant's counterclaim for damages allegedly resulting from Plaintiff's illegal walkout.

The Union suggests the claim must be dismissed because it does not involve a major dispute, but instead also involves a minor dispute within the exclusive jurisdiction of the System Board of Adjustment. Alaska, on the other hand, suggests this is a "major dispute" within the jurisdiction of this Court.

Under the Ninth Circuit's most recent interpretations of the RLA, Defendant's counterclaim against Plaintiff involves the meaning, interpretation or proper application of the existing collective bargaining agreement, and therefore is a "minor" within the meaning of the RLA. *International*

Association of Machinists v. Aloha Airlines, 776 F.2d 812 (9th Cir. 1985); *International Association of Machinists v. Republic Airlines*, 761 F.2d 1836, 1839 (9th Cir. 1985). Accordingly, this Court lacks subject matter jurisdiction to entertain Defendant's counterclaim, and as such, it is DISMISSED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED the 6th day of June, 1986.

/s/

WALTER T. McGOVERN
Chief United States District Judge

APPENDIX C

Railway Labor Act 45 U.S.C. § *152 General duties*. . .

. . . **Third. Designation of representatives.** Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organizations by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to

influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in the Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Air Carrier Amendments 45 U.S.C. § 181. Application of 45 USCS §§ 151, 152, 154-163 to carriers by air.

All of the provisions of Title I of the Act [45 USCS §§ 151-163], except the provisions of section 3 thereof [45 USCS § 153], are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

§ 182. Duties, penalties, benefits, and privileges.

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of Title I of this Act [45 USCS §§ 151-163], except section 3 thereof [45 USCS § 153], shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees

were specifically included within the definition of "carrier" and "employee", respectively, in section 1 thereof [45 USCS § 151].

. . . **§ 184. System, group, or regional boards of adjustment.** The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted Apr. 10, 1936] before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title [45 USCS §§ 181 et seq.] to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act [45 USCS § 153].

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class

or classes of their employees, both acting through their representaives selected in accordance with provisions of this title [45 USCS §§ 181 et seq.], from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similar limited jurisdiction.